before this Court forthwith. As the custody of the applicant is under the control and direction of this Court by virtue of the Writ I make a further order that he be discharged from custody, unless some other reason be found for his detention. This brings me to the charge of gang robbery pending against him. The magistrate after hearing all parties, thought fit to allow Bail in $10,000, and I should not feel disposed to alter his decision in that regard, even if I had power to do so. That order therefore still stands, and although I am informed that periodically since January 2nd the magistrate has remanded the applicant in custody, it is only logical to suppose that he has done so on the strength of the information which was given him on that date, and that if it had not been for such information, the Bail Bond would have remained in force.

The applicant is therefore entitled to be released on the Bail fixed by the magistrate and with the sureties approved by him, but I order that his passport remain in the custody of this Court pending the final determination of the gang robbery charge in whatever Court that final determination may be. There being no other reason for his detention, he may be immediately discharged. The applicant is to have the costs of this application.

Order accordingly.

KANG BARK TENG & ANOR. v. LEE KWEE LIM & ANOR. *

[Orig. Civ. Juris. (Rogers, J.) January 21, 1952]

[Singapore — Suit No. 307 of 1951]

Negligence — Motor accident — Death of passenger — Joint liability of tortfeasors — Quantum of damages — Civil Law Ordinance, s. 8.

The deceased, a healthy man of 29 years old, was an unlicenced pork seller. He was killed as a result of a collision between a motor car and the lorry in which he was travelling. He had dependants and his earnings were about $300/- per month.

Held, on the facts both the car and lorry drivers were equally liable for damages. Having regard to the fact that the deceased was an unlicensed hawker it was not possible to say what his prospects were and damages were assessed under section 8 of the Civil Law Ordinance and for loss of expectation of life.

Case referred to:—

(1) *Benham v. Gambling* (1941) 1 All E.R. 7.

ACTION FOR DAMAGES.

D. Murphy for the plaintiffs.

L. A. J. Smith for the 1st defendant.

Chong Thutt Pitt for the 2nd defendant.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Rogers, J. : — In this case it has been proved or admitted that the deceased was a healthy man of 29 years of age, that he had a wife who is now 21, one small boy, and a mother and 2 younger sisters, all of whom lived with him and for whose maintenance he had made himself responsible. It is also proved or admitted that he lost his life, through no fault of his own, through a cross roads collision between the lorry upon which he was travelling and a motor car being driven in the opposite direction. The said collision occurred shortly before 6 a.m. on 4th May, 1950.

On the question of liability, I find no difficulty in deciding that there was negligence on the part of both drivers. Each to my mind was failing to keep an adequate lookout, and each was travelling at a speed which in the circumstances of the case was excessive. I therefore hold that the plaintiff is entitled to recover against both.

I now pass to the question of damages which as in all cases of this nature presents a certain amount of complexity. It appears that the deceased, and according to the evidence of Mr. Peng Soon Kuay, others like him were earning their livings as hawkers of pork in Middle Road, and from this business, the deceased was earning a sufficient livelihood to keep his dependants as herein set out. To carry on this business, however, he had no licence and was thereby committing a flagrant breach of section 194(4) of the Municipal Ordinance. It appears that the breach of this section was not only ignored by those responsible for enforcing its observance, but the deceased was also permitted to use the Municipal abattoir for the slaughter of his pigs. These conditions can hardly be described as satisfactory, and I am informed that steps are being taken elsewhere to remedy the position. In the meantime what of the deceased's prospects in this rather precarious enterprise? He was earning about $300 a month at the time of his death, and so long as pork continues to be a popular form of nourishment, his business would have gone on, but the question to be considered is for how long it would have done so.

On the one hand, the section which he was contravening might be repealed, which would have

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* The judgment reported in (1951) M.L.J. 44 was set aside on the ground that although the Letters of Administration had been granted to the plaintiffs but no grant had been extracted until after the trial. The plaintiffs having extracted the grant instituted new proceedings. — *Ed. M.L.J.*

completely changed his position from one of uncertainty to one of stability. On the other hand a sudden decision to enforce the section strictly would have the effect of driving him out of business altogether. It is impossible to say what his prospects were. However, as he was and had been for some time earning $300 a month at the time of his death, I will fix the damages on behalf of the dependants on that basis. I award the widow the sum of $5,000, the infant child the sum of $2,500, and the mother the sum of $1,000, making $8,500 in all. I do not consider it necessary to make any award in respect of either of the sisters one of whom is now married and the other working.

In addition there is the claim on behalf of the estate for damages in respect of loss of expectation of life. To attempt to assess damages under this heading is what Simon, L.C. described in *Benham v. Gambling*[1] as an attempt to equate incommensurables. He also says in the same judgment that it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. Moreover later, His Lordship declares that the degree of happiness to be attained by a human being does not depend on wealth or status. What then had this young man to look forward to?

Normally, a considerable number of years of married life with his wife and family would have been his lot, and of those years he has been deprived at the comparatively early age of 29.

I award his estate the sum of $1,000 in respect thereof, and this amount together with the agreed special damage of $550, make a total of $10,050. I give judgment accordingly for this sum against both defendants with costs to be taxed.

Order accordingly.

AHMAD SHAH BIN YASSIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Taylor, J.) January 23, 1952]

[Selangor — Criminal Appeal No. 76 of 1952]

Criminal Procedure Code, s. 319(ii) — Misjoinder of Charges.

The accused pleaded guilty to a charge of cheating and another of theft, both profferred at the same time.

Held, the misjoinder vitiated the trial.

Held further, the Court had discretion to order a retrial but in the peculiar circumstances of the case the Court exercising the powers of the Sessions Court in the interest of justice had power to charge the accused and record his plea.

CRIMINAL APPEAL from Sessions Court, Kuala Lumpur.

Appellant in person.

D. M. K. Grant (Deputy Public Prosecutor) for respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This accused was charged in the Sessions Court with cheating and theft. The two offences were committed within a month but were not connected with one another and therefore the two charges could not be joined in one trial.

The accused pleaded guilty to both; he had previous convictions and the learned President sentenced him to two years and three years consecutively.

The cheating was in respect of $35 only but it was effected by a mean and heartless trick, the accused taking advantage of the anxiety of a woman over the custody of an adopted child. The theft was of jewellery estimated at $70 belonging to people who had allowed the accused to stay in their house. Either of these offences taken separately might have been dealt with leniently apart from the previous convictions, and even in view of the previous convictions the total sentence of five years was excessively severe.

In spite of the fact that the accused pleaded guilty to both charges, I am of opinion that the misjoinder vitiated the trial and that both the convictions must be quashed. I do not say that every misjoinder must necessarily vitiate a trial but a misjoinder which directly violates an express statutory provision will usually have that effect.

Counsel for the Public Prosecutor did not ask for a retrial feeling, and rightly, that the prosecution had made the initial error but retrial is a matter of discretion and in the circumstances of this case I feel that justice required that some further proceedings should be taken. I therefore explained to the accused that both his convictions were quashed and that the proceedings would start *de novo* and caused him to be charged afresh with the cheating before me, exercising the powers of the Sessions Court given to the High Court by the Courts Ordinance. This is an unusual course but in the peculiar circumstances of this case I thought that it would be difficult for a Sessions or Magistrates' Court to deal with the matter satisfactorily, and in any event, sending the prisoner back to a lower Court would have involved delay, expense and probably embarrassment to him; he pleaded guilty to the charge and to the previous convictions and I then sentenced